Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Restoring Internet Freedom	)	WC Docket No. 17-108

REPLY COMMENTS OF CTIA

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CTIA submits the following reply comments in response to the rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

In its opening comments, CTIA explained that mobile broadband providers have long supported an open Internet. They have invested billions of dollars in next-generation mobile broadband networks and offerings precisely so that their customers are able to access the content, applications, and services they want. Indeed, competition in the mobile wireless marketplace demands that providers deploy and maintain open networks that meet customers' demands.

CTIA also explained that the *Title II Order*[2] imposed a misguided framework for ensuring Internet openness. This regulatory regime has no place in the mobile broadband ecosystem, where change is the only constant. Competition throughout the mobile space demands relentless innovation, as providers race to anticipate and accommodate fast-evolving customer desires. The *Title II Order* restricts rather than promotes such innovation. It divides

[1] *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) ("*Notice*").

[2] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Title II Order*").

the realm of mobile broadband offerings into two categories: Those that are *already* illegal today, and those that might be deemed unlawful tomorrow. Thus, the common carrier regime – particularly as implemented through the vague "general conduct standard" – presents providers with an untenable choice. They can refuse to innovate, guarding themselves against legal liability but thereby failing to meet their customers' demands, or they can work to meet consumers' needs, never knowing whether a regulator or court will determine after the fact that their new offerings violate a requirement that nobody knew existed.

As CTIA and many others stated, this regime disserves American consumers and runs counter to the wishes of Congress, which deemed services such as broadband Internet access to be information services, and intended for mobile broadband to be a private mobile service exempt from common carriage. The Commission therefore should re-reclassify mobile broadband internet access, and should revoke the open-ended general conduct standard. The Commission also should correct other errors inherent in the 2015 decision – for example, by eliminating the *Title II Order*'s categorical restrictions and the so-called "enhancements" to the 2010 transparency rule, both of which harm consumers.

Likewise, the Commission should reaffirm that broadband Internet access is an inherently interstate service *and* that states and their political sub-divisions have no jurisdiction to apply their own regulatory mandates. Finally, the Commission should support additional Congressional action to settle debates over broadband classification and Internet openness that have roiled the industry for well over a decade. To rectify this situation, Congress should now step in and legislate specific, common-sense net neutrality rules that advance consumer welfare *and* promote investment and innovation.

II. THE MOBILE BROADBAND MARKETPLACE IS A THRIVING, ROBUSTLY COMPETITIVE ECOSYSTEM THAT FOSTERS A FREE AND OPEN INTERNET.

The opening comments show that the mobile broadband marketplace is highly competitive and teeming with innovation. This marketplace enables – indeed, demands – a free and open Internet, and no commenter has put forward compelling evidence to the contrary.

Declarations by leading economists detail the many choices consumers enjoy among wireless broadband providers and their ability to readily switch among them.[3] In fact, the record reflects little meaningful dispute about the matter. The vast majority of consumers can choose from among numerous options in the marketplace,[4] which include established facilities-based providers operating at the national, regional, and local levels,[5] important new facilities-based entrants such as cable companies,[6] and resellers.[7] The evidence further demonstrates that these providers are engaged in a "vigorous competitive rivalry" to capture additional customers, which is reflected in providers' "aggressive promotions of unlimited data plans," metrics of industry pricing "show[ing] steady declines over the last several years," and the "steady growth in the quality of wireless offerings, as reflected in various performance metrics" such as increases in

[3] *See generally* Declaration of Mark A. Israel, Allan L. Shampine & Thomas A. Stemwedel, WC Docket No. 17-108, at 14 (July 17, 2017) ("Israel, Shampine & Stemwedel Decl.") (attached to AT&T Services Inc. comments) ("Publicly available data confirm that consumers have multiple high quality choices for wireless broadband Internet access services."); Andres V. Lerner & Janusz A. Ordover, *An Economic Analysis of Title II Regulation of Broadband Internet Access Providers*, WC Docket No. 17-108, at 15 (July 17, 2017) ("Lerner & Ordover Decl.") (attached to Verizon comments) ("It is widely accepted that there is significant competition between wireless broadband Internet access providers."); Christian M. Dippon, White Paper, *Public Interest Repercussions In Repealing Utility-Style Title II Regulation and Reapplying Light-Touch Regulation to Internet Services*, WC Docket No. 17-108, at 14-15 (July 17, 2017) ("Dippon Decl.") (attached to Comcast Corporation comments) ("[T]here can be no serious dispute that for the vast majority of U.S. customers wireless companies are competing with one another.").

[4] *See* Lerner & Ordover Decl. at 16; *see also* Israel, Shampine & Stemwedel Decl. at 12; Dippon Decl. at 14.

[5] Israel, Shampine & Stemwedel Decl. at 12; *see also* Lerner & Ordover Decl. at 16-17.

[6] Israel, Shampine & Stemwedel Decl. at 12-13; *see also* Lerner & Ordover Decl. at 17-18.

[7] Lerner & Ordover Decl. at 17; Israel, Shampine & Stemwedel Decl. at 14.

median download speeds.[8] As one submission aptly explains, "Mobile wireless speeds continue to rise and prices per megabyte of data continue to fall. Wireless competition also has facilitated the availability of a wide variety of devices (and associated operating systems), apps, and services that are complements to a robust wireless broadband ecosystem. The significant investments and vigorous competition between wireless providers also has led to a rapid increase in output, both in terms of consumer connections and usage."[9]

Even defenders of the *Title II Order* recognize the high degree of competitiveness and innovation that define the mobile marketplace. Public Knowledge and Common Cause, for instance, acknowledge the competitive nature of mobile broadband[10] while also emphasizing the growth and innovation surrounding mobile devices and apps.[11] Likewise, the Open Technology Institute at New America ("OTI") describes the "growth of the wireless ecosystem," including increases in speed, traffic, and capacity supported by mobile networks as well as advances in smartphone use – all of which is itself proof of competition.[12] And even Free Press concedes the positive effects of mobile broadband competition, referring to T-Mobile's "pro-competitive

[8] Israel, Shampine & Stemwedel Decl. at 15-18.

[9] Lerner & Ordover Decl. at 24.

[10] *See* Comments of Public Knowledge and Common Cause, WC Docket No. 17-108, at 77-78 (filed July 17, 2017) ("Public Knowledge/Common Cause").

[11] *Id.* at 9-11 (explaining how "[t]he last decade's explosive growth in mobile devices has come to define much of today's Internet"). However, their follow-on effort to deny mobile broadband providers credit for this growth by claiming that the "mobile application system" has developed "independently" is illogical and incorrect, as it ignores the well-recognized notion of the virtuous cycle – which Public Knowledge itself touts in the same comments. *Id.* at 114.

[12] Comments of the Open Technology Institute at New America, WC Docket No. 17-108, at 99-110 ("OTI") (filed July 17, 2017) (filed as Sarah Morris). OTI's attempt to dilute the significance of this competition by citing the *Title II Order*'s flawed and outdated claims about switching costs, *see id.* at 109-111, does not reflect the reality of the mobile marketplace. *See infra* at 6-7.

moves,"[13] "price competition" created by T-Mobile, Sprint, and others,[14] and mobile marketplace developments (such as AT&T's 4G LTE advances) that were "spurred on by competitors' upgrades."[15]

None of this should surprise the Commission, which compiled data last year reflecting the intense competition and innovation in the mobile space for the *Nineteenth Report* on mobile competition,[16] and recently collected evidence to update those findings in the anticipated *Twentieth Report*.[17] As CTIA has reported, nearly all Americans have a choice of at least three providers of wireless voice and 4G LTE today.[18] This dynamic competition propels a consumer-centric approach that, well before 2015 and the *Title II Order*, drove investment and innovation, maximized benefits for customers, and protected against harms related to Internet openness.[19]

This competition in the mobile ecosystem eviscerates any notion that mobile broadband providers act as "gatekeepers" restricting customers' access to the content and services that providers prefer – a central yet mistaken premise of the *Title II Order*. Indeed, economists explain that "the fundamental assumptions of the 'gatekeeper' framework do not apply to the provision of broadband Internet access services where there is effective competition," because "broadband providers face significant market constraints that limit their ability to implement

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[13] Comments of Free Press, WC Docket No. 17-108, at 156 (filed July 17, 2017) ("Free Press").

[14] *Id.* at 162.

[15] *Id.* at 244-245.

[16] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Nineteenth Report, 31 FCC Rcd 10534 (2016) ("*Nineteenth Report*").

[17] *See, e.g.*, Comments of CTIA, WT Docket No. 17-69 (filed May 8, 2017); Reply Comments of CTIA, WT Docket No. 17-69 (filed June 7, 2017); *see also Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition*, Public Notice, 32 FCC Rcd 1950 (2017).

[18] Comments of CTIA, WC Docket No. 17-108, at 3-4 (filed July 17, 2017) ("CTIA").

[19] *See, e.g.*, Lerner & Ordover Decl. at 13.

unreasonable business models or practices vis-à-vis content providers."[20] If a broadband provider "attempted to block or throttle specific content, its end user customers would be directly affected by, and could directly observe, that behavior, and they would have the incentive and ability to react to that conduct" – in contrast to the sort of "terminating access monopoly" that the *Title II Order* alleged was enjoyed by all broadband providers.[21] In short, this competitive dynamic – in the mobile broadband marketplace, in particular – undermines the premise for the *Title II Order*'s regulation.

Given these facts, parties seeking to defend the *Title II Order* are forced to reject the relevance of competition entirely, relying instead on what Public Knowledge and Common Cause call "various non-competition-related rationales" to justify the imposition of common carriage and heavy-handed open Internet mandates.[22] These claims, however, ask the Commission to conclude that the basic laws of economics do not apply to the broadband marketplace – in other words, that competitive forces cannot or will not prompt providers to meet their customers' demands for access to the content and services they desire.[23] The facts are otherwise. The days of the walled garden ended long before the *Title II Order* was adopted. For many years, competitive and technological forces have ensured that mobile customers have enjoyed open platforms, pushing providers to satisfy their customers' needs lest they switch to a competitor. These forces have become even more potent as the marketplace has moved away

[20] *Id.* at 29-31, 33-37.

[21] Israel, Shampine & Stemwedel Decl. at 34-36.

[22] Public Knowledge/Common Cause at 78; *see also* Free Press at 71-73; OTI at 103-06.

[23] Even the D.C. Circuit judges who formed the majority that voted to uphold the *Title II Order* acknowledged the disciplining effect of competition on broadband providers. *See United States Telecom Ass'n v. FCC*, 885 F.3d 381, 390 (D.C. Cir. 2017) (Srinivasan, J., and Tatel, J., concurring) (suggesting that no ISP had indicated an interest in blocking for "an understandable reason: a broadband provider representing that it will filter its customers' access to web content based on its own priorities might have serious concerns about its ability to attract subscribers").

from long-term contracts and early termination fees and toward increased handset portability, as well as incentives to switch carriers in the form of cash payments and free data, as confirmed by economic evidence presented with the opening comments.[24] There is no basis for the Commission to ignore the competitiveness of the marketplace in evaluating the benefits and costs of common carrier regulation.[25]

Likewise, those who focus on regulatory parity between fixed and mobile services for its own sake fail to acknowledge just how much the fierce competition in the mobile broadband marketplace described above is promoting consumer welfare and policing providers' behavior. For example, without basis in fact, OTI insists that "[t]he comparative degree of competition in the fixed and mobile markets for BIAS is neither a relevant nor a sound basis for establishing a divergent regulatory framework for open internet consumer protections."[26] The record is brimming with evidence that expansive Title II regulation is inappropriate for *all* broadband platforms, and it is especially clear in demonstrating that such regulation would be both unnecessary and harmful to consumers' interests in the robustly competitive mobile broadband marketplace.

[24] *See, e.g.*, Israel, Shampine & Stemwedel Decl. at 19-24; Lerner & Ordover Decl. at 21-23. The *Title II Order* sought to conjure a new barrier to switching, asserting that "informational uncertainty" regarding the responsibility for service problems "may" act as a barrier. Its subsequent determination to regulate the service provider, *Title II Order*, 30 FCC Rcd at 5642 ¶ 99, was (and remains) a complete *non sequitur*, recalling the apocryphal drunkard who searches for his keys under the streetlamp not because he lost them there but rather because that is where the light is.

[25] In forgiving the Commission for not making a finding of market power, the D.C. Circuit did not assess the relevance of any policy rationale – based on competition or otherwise – to justify the *Title II Order*, nor was it even asked to do so. Rather, the court merely noted that a finding concerning market power was not a "prerequisite" to the legal question of classifying broadband. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 708 (D.C. Cir. 2016); *see also United States Telecom Ass'n v. FCC*, 885 F.3d at 383. ("Our task is not to assess the advisability of the rule as a matter of policy. It is instead to assess the permissibility of the rule as a matter of law.").

[26] OTI at 109 (citation omitted).

III. CONGRESS SOUGHT MINIMAL INTRUSION INTO THE INTERNET ECOSYSTEM, AND THE RETURN TO A LIGHT TOUCH FRAMEWORK CHARACTERIZED BY EXCLUSIVE FEDERAL JURISDICTION WILL BETTER MEET CONGRESS'S INTENT.

If nothing else, the *Title II Order*'s proponents' far-flung comments demand that the Commission return to "first principles" in analyzing the classification of broadband Internet service and the appropriate regulatory framework for such offerings. It is axiomatic that it is Congress, in the first instance, that makes policy determinations of the type at issue here. Thus, the Commission's analysis must, as always, begin with the statutory provisions that govern broadband Internet service and mobile services. Here, those provisions make abundantly clear Congress's intent that services such as broadband Internet access should be subject to light-touch regulation and exempt from common carriage. Barriers against re-reclassification asserted by the *Title II Order*'s defenders present no obstacle to the Commission's proposed framework. Finally, the statute emphasizes Congress's intention that inherently interstate offerings such as broadband Internet access should be subject to exclusive federal jurisdiction.

A. The 1996 Act and OBRA-93 Underscore Congress's Preference for Market Forces Over Regulation in Policing the Behavior of Communications Providers.

Various defenders of the *Title II Order* base their arguments on convenient mythologies regarding the intentions of Congress or the fundamental purpose of common carrier requirements. For example, while Free Press recognizes the deregulatory intent of the 1996 Act, it offers a narrative in which the Act's drafters were dedicated foremost to perpetual forced access to networks, even amidst robust competition[27] – a vision that (as detailed below) finds no support in the Act itself. Various parties argue that the Title II approach is necessary to

[27] *See* Free Press at 43.

fulfillment of their specific policy goals, without ever engaging with the relevant legal authorities.[28] And Free Press cites to polls purporting to show a public preference for Title II.[29]

These ends-driven approaches turn the proper analysis on its head. The agency's job, in the first instance, is to interpret the statute, informed first and foremost by the text, structure, and history of the provisions at issue, and then by its views on the appropriate policy framework. This is true even if the statute is properly deemed "ambiguous" within the meaning of *Chevron*, for, as the Supreme Court admonished in that very decision, an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis."[30]

Here, the two statutes at issue – the Telecommunications Act of 1996 ("1996 Act") and the provisions of the 1993 Omnibus Budget Reconciliation Act addressing mobile service ("OBRA-93") – reflect Congress's broad preference for market forces over regulation, both generally and with respect to mobile services and Internet access specifically. To begin with, both pieces of legislation reflected Congress's strong preference to limit or eliminate regulation as competitive market forces spread.

As the Commission has explained, OBRA-93's "overarching congressional goal" was to "promot[e] opportunities for economic forces – not regulation" – to govern mobile service markets.[31] Thus, that legislation "dramatically revise[d] the regulation of the wireless telecommunications industry."[32] Similarly, the 1996 Act's preamble stated that its purpose was

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[28] *See, e.g.*, Comments of National Consumer Law Center et al., WC Docket No. 17-108, at 2 (filed July 17, 2017); Comments of National Consumers League, WC Docket No. 17-108, at 3-5 (filed July 17, 2017); Comments of Etsy, Inc., WC Docket No. 17-108, at 6 (filed July 17, 2017).

[29] Free Press at 43-44.

[30] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 863-64 (1984).

[31] *Implementation of Sections 3(n) and 332 of the Communications Act*, Third Report and Order, 9 FCC Rcd 7988, 8004 ¶ 29 (1994).

[32] *Cellnet Communs. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998).

"[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[33]

The 1993 and 1996 Acts each contain various provisions further revealing their deregulatory intent, particularly with regard to next-generation offerings. OBRA-93 included a provision permitting the Commission to deem statutory requirements inapplicable to providers of commercial mobile radio service ("CMRS") – i.e., to forbear from applying such requirements – where it determines that enforcement is not necessary to ensure that charges and practices are just and reasonable, that enforcement is not necessary to protect consumers, and that the decision not to apply the requirement is consistent with the public interest.[34] It also limited state authority to regulate mobile providers' rates or market entry.[35]

The 1996 Act expanded on the earlier legislation's deregulatory imperatives. In Section 10, Congress extended the availability of the forbearance mechanism to *all* telecommunications services,[36] and imposed a default grant in cases where the Commission failed to act within the statutorily prescribed timeframe (i.e., one year, unless the agency extended the deadline by up to 90 days).[37] Section 11, in turn, required the agency to review all its Title II regulations every

[33] Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (preamble).

[34] 47 U.S.C. § 332(c)(1)(A).

[35] *Id.* § 332(c)(3).

[36] *Id.* § 160.

[37] *Id.* § 160(c). Of course, the *Title II Order* turned this provision on its head, reading it as giving the Commission license to impose expansive *new* regulations on broadband Internet access while forbearing from a limited class of requirements it found inappropriate (at least "at this time" or "for now"). *See, e.g.*, CTIA at 7 (discussing the *Title II Order*'s repeated references to the potentially temporary nature of its forbearance determinations). Notwithstanding this subversion, section 10 evidences the 1996 Congress's desire to see market mechanisms, rather than regulation, govern communications offerings wherever possible.

two years and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[38]

As CTIA, the courts, and others have emphasized, both the 1993 and 1996 Acts specifically exempted non-common-carrier offerings from common carrier mandates. OBRA-93 specified that "[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter,"[39] and carefully limited the CMRS category such that a significant swath of service offerings would be exempt from common carriage mandates altogether.[40] The 1996 Act likewise provided that "[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."[41]

B. Congress Clearly Intended to Exempt Broadband Internet Access From Heavy-Handed Common Carrier Regulation.

The *Title II Order*'s defenders contend that none of this matters, because broadband Internet access is a common carrier "telecommunications service." They are wrong. The 1996 Act, in particular, demonstrates that Congress intended for offerings such as broadband Internet access to be classified as information services.[42] In Section 230(b)(2), Congress stated that "[i]t is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or

[38] *Id.* § 161.

[39] *Id.* § 332(c)(2); *see also infra* Part V.

[40] *See id.* § 332(d) (defining terms).

[41] 47 U.S.C. § 153(51).

[42] *See also infra* Part IV (addressing commenters' specific arguments as to whether broadband internet access is a telecommunications service or information service), Part V (addressing commenters' specific arguments as to whether mobile broadband internet access is CMRS or PMRS).

State regulation ….”[43] In Section 230(f)(2), Congress was even more specific, providing that the term “interactive computer service” included any “information service, … *including specifically a service … that provides access to the Internet*.”[44] In short, Congress here directly stated that “a service … that provides access to the Internet” was, from its perspective, an “information service.”

Congress’s intent to classify Internet access as an information service is further confirmed by the precedent that was in place at the time it passed the 1996 Act. Specifically, in adopting “telecommunications service” and “information service” categories, Congress ratified existing authorities, including the Commission’s discussion of the *Computer Inquiries*’ basic/enhanced service dichotomy and decisions relating to the Modification of Final Judgment that settled the Department of Justice’s antitrust suit against AT&T in the early 1980s (“MFJ”). In 1980, the Commission expressly defined any service that provided “subscriber interaction with stored information” as an enhanced service under the *Computer II* framework.[45] As the Commission has made clear, the 1996 Act’s definition of “information services” includes “all of the services that the [FCC] has previously considered to be ‘enhanced services.’”[46] In 1987, the court overseeing the MFJ found that even a gateway service offering “mere database access”

[43] 47 U.S.C. § 230(b)(2); *see also* Comments of American Cable Association, WC Docket No. 17-108, at 53-55 (filed July 17, 2017) (“ACA”); Comments of AT&T Services Inc., WC Docket No. 17-108, at 71-73 (filed July 17, 2017) (“AT&T”); Comments of Comcast Corporation, WC Docket No. 17-108, at 24-25 (filed July 17, 2017) (“Comcast”); Comments of the Free State Foundation, WC Docket No. 17-108, at 21 (filed July 17, 2017) (“Free State Foundation”); Comments of FreedomWorks Foundation, WC Docket No. 17-108, at 3-4 (filed July 17, 2017).

[44] 47 U.S.C. § 230(f)(2) (emphasis added).

[45] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order, 84 F.C.C.2d 50, 54 ¶ 12 (1980); 47 C.F.R. § 64.702(a).

[46] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955 ¶ 102 (1996).

constituted an "information service" under the Consent Decree's definition of that term, which very closely tracked the 1996 Act's later definition of "information service."[47] These precedents, available to Congress as it considered the 1996 Act, must guide the Commission's interpretation of that statute's language. Where Congress uses terms "obviously transplanted from another legal source, … it brings the old soil with it."[48]

Given the above, it is appropriate to revisit the broadband Internet access classification imposed in the *Title II Order* in light of Congress's clear preference for market forces over regulation, and for classification of broadband Internet access as an "information service," as these reply comments do below.

C. Alleged Barriers to Reclassification Are Illusory.

Some commenters state, incorrectly, that a change in course is impermissible here because there has been no change in the underlying facts since the *Title II Order* issued in 2015.[49] As noted, under *Chevron*, an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis."[50] Such ongoing reevaluation may be based on a wide range of factors, and need not be premised on changed factual circumstances. As the *Brand X* majority held:

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[47] *United States v. Western Elec. Co.*, 673 F. Supp. 525, 587 (D.D.C. 1987). *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) ("'Information Service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.").

[48] *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013).

[49] *See, e.g.*, Revised Comments of the Attorneys General of the States of Illinois *et al.*, WC Docket No.17-108, at 1-18 (filed July 19, 2017) ("Attorneys General"); Comments of Mozilla, WC Docket No.17-108, at 6 (filed July 17,2017); Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 17-108, at 6-10 (filed July 17, 2017) ("NASUCA").

[50] *Chevron*, 467 U.S. at 863-64.

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency … must consider varying interpretations and the wisdom of its policy on a continuing basis – for example, in response to changed factual circumstances, *or* a change in administrations. That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.[51]

The *Title II Order* itself recognizes this point, refusing to rely on any changed circumstances as the basis for its reclassification of broadband Internet access: "We clarify that, even assuming, *arguendo*, that the facts regarding how BIAS is offered had not changed, in now applying the Act's definitions to these facts, we find that the provision of BIAS is best understood as a telecommunications service, as discussed below, … and disavow our prior interpretations to the extent they held otherwise."[52] The D.C. Circuit in turn cited this language in fending off claims that the 2015 majority had failed to cite new facts warranting its change in course.[53] Thus, the *Title II Order* reversed a prior statutory interpretation based merely on a change in regulatory philosophy, which caused the majority to "disavow" the agency's older view. This language was critical to the court's affirmance, because in fact there *was no relevant change* between 2005 and 2015. As a factual matter and as first described in the *Cable Modem Order*, ever since, broadband Internet access has been "a single, integrated service that enables the subscriber to utilize Internet access service through a [broadband] provider's facilities and to realize the benefits of a comprehensive service offering."[54] To the extent that the *Title II Order*

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[51] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981-82 (2005) ("*Brand X*") (emphasis added) (citations omitted).

[52] *Title II Order*, 30 FCC Rcd at 5761 ¶ 360 n.993.

[53] *USTelecom*, 825 F.3d at 709 ("[W]e need not decide whether there 'is really anything new' because … the Commission concluded that changed factual circumstances were not critical to its classification decision ….").

[54] *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4822 ¶ 38 (2002) ("*Cable Modem Order*").

held otherwise – whether or not its conclusion relied on that holding – this Commission should cure the prior Commission's error.

The D.C. Circuit's decision upholding the *Title II Order* does not limit the current Commission's latitude here. Even if the *USTelecom* panel decision were to survive Supreme Court review,[55] that decision *at most* reflected the court's view that the *Title II Order*'s statutory interpretation was a reasonable one (although not necessarily the *only* reasonable one), and thus survived *Chevron* step two review.[56] In *Brand X*, of course, the Supreme Court upheld the prior Commission's decision that broadband Internet access "provides consumers with a comprehensive capability for manipulating information using the Internet,"[57] and rejected claims that the link between the customer's location and the broadband provider's network could *only* be deemed a telecommunications service. Because that prior Commission's characterization of broadband Internet remains accurate today, *Brand X* conclusively establishes the Commission's authority to restore the information service classification.

In any case, CTIA respectfully submits that the *USTelecom* panel's decision is based on a misreading of *Brand X*, and thus is wrong on the merits. Contrary to the panel's claim that *Brand X* deemed the statute ambiguous with regard to broadband classification as a whole,[58] no Justice in *Brand X* doubted that services providing customers with access to the Internet were "information services." Justice Scalia and his two fellow dissenters cited approvingly an FCC staff analysis calling Internet access "an enhanced service."[59] The only question as to which the

[55] Petitions seeking Supreme Court review are now due September 28.

[56] *See generally USTelecom*, 825 F.3d at 701-11.

[57] *Brand X*, 545 U.S. at 987-89.

[58] *See USTelecom*, 825 F.3d at 701.

[59] *Brand X*, 545 U.S. at 1008-09.

Court found ambiguity was whether, *in addition to* the information service, a broadband ISP also "offered" a separate telecommunications service in the link between the end user and the ISP's network. The *Brand X* majority found that the Commission had reasonably answered this question in the negative,[60] while the dissenters disagreed.[61] Thus, the *USTelecom* panel was simply wrong to claim that *Brand X* left the Commission leeway to decide that broadband Internet access was a telecommunications service in its entirety. For this reason, too, the Commission is free to re-reclassify broadband Internet access as an integrated information service.

D. Congress Intended that Broadband Internet Access Be Deemed An Inherently Interstate Offering and that the Federal Government Retain Exclusive Jurisdiction.

While various commenters concur with CTIA[62] in spelling out why exclusive federal jurisdiction is the only reasoned result,[63] a handful dispute federal preeminence in this sphere. But here, too, the Commission must return to first principles – jurisdictional considerations, just like classification questions, are governed by the framework established by Congress. The Commission must therefore make clear that state regulation in this area is preempted by federal law and policy. Such regulation would be incompatible with broadband Internet access's inherently interstate nature and would reintroduce the uncertainty and risk that this proceeding seeks to eliminate.

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[60] *See, e.g., id.* at 988, 997.

[61] *See, e.g., id.* at 1007, 1010.

[62] *See* CTIA at 54-58.

[63] *See, e.g.*, Comments of Cox Communications, Inc., WC Docket No. 17-108, at 35-37 (filed July 17, 2017) ("Cox"), Comcast at 79-82; Comments of NCTA – The Internet & Television Association, WC Docket No. 17-108, at 63-68 (filed July 17, 2017) ("NCTA"); Comments of T-Mobile USA, Inc., WC Docket No. 17-108, at 25-27 (filed July 17, 2017) ("T-Mobile"); Comments of Verizon, WC Docket No. 17-108, at 21-22 (filed July 17, 2017) ("Verizon").

The Communications Act demonstrates Congress's intent that the federal government, not the states or their political subdivisions, should be responsible for the regulatory treatment of broadband Internet communications. As CTIA observed in its opening comments, Section 152 endows the Commission with authority over "all interstate and foreign communication by wire or radio," and reserves state authority only with regard to "intrastate communication service."[64] As the *Title II Order* appropriately recognized, broadband Internet access is a "jurisdictionally interstate" service.[65] The Commission should eliminate any doubt as to the implication of this conclusion by stating unequivocally that regulation of broadband Internet access by states or their political subdivisions is off limits. As noted above, Section 230 specifies that "[i]t is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal *or State* regulation …,"[66] clearly evidencing Congress's intent to supersede states' judgments regarding the propriety of regulating Internet traffic. Even absent such a direct injunction, federal preemption is appropriate where, as here, it would be impossible to apply state regulation to this interstate offering without interfering with federal aims.[67]

Further, nothing in Section 706 purports to override the Act's broader jurisdictional allocations. As CTIA has explained, even if that provision did provide states with authority to regulate "advanced telecommunications capability" generally,[68] that grant should not be

[64] 47 U.S.C. § 152.

[65] *Title II Order*, 30 FCC Rcd at 5803 ¶ 431.

[66] 47 U.S.C. § 230(b)(2) (emphasis added).

[67] *See, e.g., Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22418-24 ¶¶ 23-32 (2004) ("*Vonage Holdings MO&O*").

[68] *Cf. Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014) (suggesting Section 706 might serve as a grant of authority to state commissions).

interpreted to apply to *all* advanced telecommunications capabilities; the best reading of the Act would be that any Section 706 grant of authority to states must be read consistent with Section 152, and thus limited to *intrastate* advanced services. That category could, for example, include some high-speed point-to-point offerings that are both physically and jurisdictionally intrastate, but even the *Title II Order* recognizes that it does *not* include broadband Internet access.

Free Press contends that Congress "did not grant the Commission preemption authority over state regulation of information services."[69] If Free Press means to suggest that the Commission cannot preempt states except where Congress has explicitly directed or permitted it to do so, this is simply wrong. In the Supreme Court's words, "[p]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[70] Thus, federal policy preempts whenever (1) the state or local law stands as an obstacle to achieving federal objectives, or (2) the federal government occupies the field (as it does with respect to the broadband policy issues here), *even in the absence of an express statutory preemption*. There is no open question, moreover, as to whether federal policy preempts state and local laws with regard to information services – the Commission answered that question affirmatively more than a decade ago.[71] NARUC, for its part, cites to its 2010 resolution broadly opposing federal

[69] Free Press at 56.

[70] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982); *see also id.* at 153 ("Absent explicit pre-emptive language, Congress's intent to supersede state law altogether may be inferred because [the] scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose… Federal regulations have no less preemptive effect than federal statutes.") (internal quotations and citations omitted) (alteration in original).

[71] *See, e.g.*, *Vonage Holdings MO&O*, 19 FCC Rcd 22404; *Title II Order*, 30 FCC Rcd at 5804 ¶ 433 (stating Commission's "firm intention to exercise [its] preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme"); *Petition for Declaratory*

preemption with regard to broadband Internet connectivity and calling instead for a "functional-focus" jurisdictional model for allocating authority between states and the federal government.[72] But it, too, has said nothing that should cause the Commission to second-guess its long-standing jurisprudence in this area, much less that of the courts.

In addition to being incompatible with broadband Internet access's inherently interstate nature, state and local regulation would undercut the policy objectives that the Commission proposes to achieve by reestablishing broadband Internet access's "information service" classification. The *Notice* states that the agency's goal is to "restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015,"[73] citing in particular the "increased regulatory burdens and regulatory uncertainty stemming from the rules adopted under Title II."[74] A framework that merely substituted a patchwork of inconsistent state and local regulation in place of federal mandates, however, would do little to ameliorate the problems arising from the *Title II Order*.

Likewise, any opening for state or local regulation in this sphere would engender the same kind of uncertainty that has caused so much trouble under the *Title II Order's* general conduct standard. The *Notice* observes that "regulatory uncertainty" is a chief cause of reduced

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Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3316 ¶ 15 (2004) ("We determine, consistent with our precedent regarding information services, that FWD is an unregulated information service and any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation".) (citation omitted).

[72] *See* NARUC at 1 n.2, *citing* Resolution Opposing Federal Preemption of States' Jurisdiction over Broadband Internet Connectivity Service, http://pubs.naruc.org/pub/53A0CFA5-2354-D714-51F8-A10975F79113.

[73] *Notice*, 32 FCC Rcd at 4435 ¶ 5.

[74] *Id.* at 4448 ¶ 44

investment under the *Title II Order*, and "may have particularly significant effects on small Internet service providers, which may be poorly equipped to address the legal, technical, and financial burdens associated with an uncertain regulatory environment."[75] A "light touch" federal regime would do little to curb uncertainty if states and localities remained free to impose their own requirements and prohibitions. Even if those could in turn be challenged, lingering questions over the viability of specific requirements and questions over what new mandates might be coming from one state or another would plague the industry. In the words used by the Electronic Frontier Foundation regarding the general conduct standard, this would be a "recipe for overreach and confusion."[76]

Further, a regime prohibiting state action that poses a conflict with federal law or policy[77] is no solution here. States and localities will likely test the boundaries of what is or is not consistent with the federal framework, forcing the Commission and the courts to evaluate regulations case by case, with broadband providers subject to the mandates at issue during the review. Even when a state law poses no direct conflict with federal law or policy, it still will result in obligations that differ in their particulars from those imposed by the federal government or other states. The resulting patchwork will either balkanize a service provider's offerings or force the provider to conform all its offerings to the requirements of the most stringent state. This outcome would badly undercut the Commission's stated objectives, harming consumers. And it is not at all hypothetical: Following enactment of the *Title II Order*, numerous states have

[75] *Notice*, 32 FCC Rcd at 4451 ¶ 48.

[76] Electronic Frontier Foundation, *Dear FCC: Rethink The Vague "General Conduct" Rule* (Feb. 24, 2015), https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules.

[77] *See Title II Order*, 30 FCC Rcd at 5803 ¶ 431.

been considering,[78] and one locality has expanded,[79] privacy mandates applicable to broadband Internet access. A wide variety of different and possibly incompatible privacy mandates would badly undermine the Commission's policy objectives, hobbling providers' ability to deploy nationwide service. It also would be entirely unnecessary, given that restoration of the "information service" classification would also restore the Federal Trade Commission's authority over broadband privacy practices.[80] Thus, the Commission should clarify that states lack authority to regulate broadband providers' network neutrality or privacy practices.[81]

IV. THE COMMENTS CONFIRM THAT BROADBAND INTERNET ACCESS IS PROPERLY CLASSIFIED AS AN INTEGRATED INFORMATION SERVICE.

As CTIA and a wide range of commenters made clear in opening comments, broadband Internet access is an integrated information service. The Commission correctly held as much for

[78] *See, e.g.*, California Broadband Internet Privacy Act, A.B. 375 (amended in Senate on August 21, 2017), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375 (would impose restrictions on broadband Internet access service providers' use and disclosure of customer proprietary information and set forth data security and breach notification requirements, among other things); Wisconsin S.B. 2017 (introduced May 11, 2017), http://docs.legis.wisconsin.gov/2017/related/proposals/sb233 (same); New York State S. 3367, § 1 (introduced Jan. 23, 2017), https://www.nysenate.gov/legislation/bills/2017/S3367 (would require Internet service providers to keep all customer information confidential unless provided written consent by the customer).

[79] On May 4, 2017, the City of Seattle adopted a rule that imposes additional compliance reporting requirements on franchised cable operators with respect to web browsing or other internet usage data. *See* Procedures for Determining Cable Operator Compliance with Cable and Internet Privacy Standards Established in SMC 21.60.825 (May 3, 2017), http://www.seattle.gov/Documents/Departments/SeattleIT/SeattleRule_ITD-2017-01.pdf.

[80] As Acting FTC Chairman Maureen Ohlhausen has noted, that agency has "brought over 500 enforcement actions protecting the privacy and security of consumer information, including actions against ISPs and against some of the biggest companies in the Internet ecosystem." Comments of FTC Commissioner Maureen Ohlhausen, WC Docket No. 16-106, at 1-2 (filed May 27, 2016).

[81] This is not to say that states lack any authority over broadband providers. State laws of general applicability will continue to govern broadband, as would (for example) communications regulations meant to ensure universal service funding for broadband networks.

many years before 2015,[82] and the Supreme Court affirmed the reasonableness of that view.[83] A plain-language reading of the law reveals this to be the best interpretation available, for broadband Internet access provides users the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," including in numerous ways that do *not* employ such capabilities "for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[84] To the extent commenters defend the *Title II Order*'s approach on the merits, their legal arguments focus on a handful of core points, and their claims all fall short.

A. Broadband Internet Access is Not, and Never Has Been, Mere Transmission.

As an initial matter, numerous parties seek to ignore the robust, processing-intensive nature of broadband Internet access, likening it instead to mere transmission. To these commenters, Internet access is a mere on-ramp to the Internet itself; they disregard that Internet access involves all the hallmarks of an information service.[85] For both technical and legal

[82] *See, e.g.*, *Cable Modem Order*, 17 FCC Rcd 4798; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*"); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) ("*Wireless Broadband Order*"); Julius Genachowski, Chairman, FCC, *The Third Way: A Narrowly Tailored Broadband Framework*, at 4 (May 6, 2010) ("Genachowski Speech") (noting the existence of "long-standing bipartisan consensus that … reclassifying broadband services as 'telecommunications services' and applying the full suite of Title II obligations has, serious drawbacks").

[83] *Brand X*, 545 U.S. 967.

[84] 47 U.S.C. § 153(24).

[85] *See, e.g.*, Comments of AARP, WC Docket No. 17-108, at 80-99 (filed July 17, 2017) ("AARP"); Comments of Access Now, WC Docket No. 17-108, at 9-11 (filed July 17, 2017); Comments of the Ad Hoc Telecom User Committee, WC Docket No. 17-108, at 1-7 (filed July 17, 2017); Amended Comments of the Center for Democracy & Technology, WC Docket No. 17-108, at 5-6 (errata filed July 19, 2017) ("CDT"); Free Press at 10, 41-42; Comments of Netflix, Inc., WC Docket No. 17-108, at 4 (filed July 17, 2017); Public Knowledge/Common Cause at 18; Comments of Vimeo, Inc., WC Docket No. 17-108, at 26-27 (filed July 17, 2017); Comments of the Writers Guild of America West, Inc., WC Docket No. 17-108, at 5-6 (filed July 17, 2017).

reasons, this narrative peddles a faulty vision of broadband service, which the Commission can and should reject.

From a technical perspective and as a factual matter, broadband Internet access involves far more than mere transmission – as Peter Rysavy explained at length in the Declaration attached to CTIA's opening comments[86] (and as others made clear in their own submissions). While the range of ISP activities that transcend simple transmission defies short summarization here, the following abbreviated list is indicative:

- Broadband routing alone involves the processing of packets at every router traversed, including the many routers involved in an ISP's network architecture[87] – a fact wholly in-line with Congress's use of "processing" as a key term in defining "information service."[88]

- ISPs also perform network address translation ("NAT") between private and external-facing public IP addresses, a technical process which involves the acquisition, processing, and storage of packets, providing functionalities to consumers that go well beyond basic transmission.[89]

- Similarly, caching – the storage and retrieval of information – is offered by broadband providers, and fundamentally constitutes an information service, giving users the ability to store and retrieve data.[90]

- Additionally, the use of the Domain Name System ("DNS") routing in ISPs' provision of broadband Internet access "exhibits all the hallmarks of an information service," whether through a server's processing of information when a DNS query is received, the generation of information when a server delivers a response, the storage of domain name information in a server's cache, the transformation of information when a server transfers requests upstream, the retrieval of information when obtaining domain names from the internet, and the utilization of information stored in its cache.[91]

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[86] *See* Declaration of Peter Rysavy, WC Docket No. 17-108 (July 17, 2017) ("Rysavy Decl.") (attached to CTIA comments).

[87] *See, e.g.*, ACA at 49 n.154; Declaration of Philip Bronsdon, WC Docket No. 17-108, at 8-13 ¶ 8(c) (attached as Appendix 2 to CenturyLink comments) ("Bronsdon Decl."); *see also* Comments of Oracle Corporation, WC Docket No. 17-108, at 2-3 (July 17, 2017).

[88] 47 U.S.C. § 153(24).

[89] Rysavy Decl. ¶ 13; *see also* Bronsdon Decl. at 5 ¶ 8(a).

[90] Rysavy Decl. ¶ 15; *see also* Bronsdon Decl. at 19-20 ¶ 8(f).

[91] Rysavy Decl. ¶¶ 19-20; *see also* Bronsdon Decl. at 6-8 ¶ 8(b).

Thus, despite the protestations of opponents, the technical functions of broadband Internet access put the lie to any overly reductionist and simplistic "dump pipe" analogies.

The *Title II Order*'s defenders equally present misguided views of the governing law, relying on long-rejected analyses to attempt to bolster their interventionist efforts. For instance, AARP argues that the "*NPRM*'s view that Internet service providers do not appear to *offer* telecommunications was soundly rebutted 12 years ago by Justice Scalia in his dissent in … *Brand X*."[92] Yet while AARP italicizes "offer," the sentence's key word is in fact "dissent": Six Justices *disagreed* with the analysis to which AARP points, and issued a majority opinion expressly rejecting Justice Scalia's position on this issue.[93]

Therefore, as technical analyses in the record and longstanding judicial precedent alike demonstrate, broadband Internet access fundamentally constitutes far more than "mere transmission."

B. Services Bundled With Broadband Transmission Are Not Mere "Add-Ons" – They Are, Rather, Parts of an Integrated "Offering" of "Capabilities" by the Broadband Provider.

Defenders of the *Title II Order* are also misguided in contending that broadband service is merely access to the Internet (which, as noted above, they paint as pure transmission), and that any bundled elements are distinct add-ons whose status as information services would not affect the classification of the broadband offering.[94]

Once again, these arguments misunderstand and misrepresent the facts, the law, or – frequently – both. Broadband providers offer bundled services – email, web hosting, and so on –

[92] AARP at xiv (internal quotations and citations omitted).

[93] *See generally Brand X*, 545 U.S. 967.

[94] *See, e.g.*, Electronic Frontier Foundation ("EFF") at 18; Free Press at 45-48; OTI at 26-27; Public Knowledge/Common Cause at 38-42.

as part of an integrated Internet service package.[95] They are "offering" their customers a broadband Internet access service that includes not only the information service capabilities of the broadband access itself (described *supra*), but also the "capabilit[ies]" afforded by the associated information services – which in themselves render broadband Internet access an integrated information service.

As the Commission established in the *Cable Modem Order* and repeated in subsequent broadband classification decisions, it does not matter whether all users utilize the bundled elements.[96] Nor does the fact that some of the offerings at issue might in some cases also be offered by third parties render them any less "integrated" into broadband Internet access when embedded in the package made available by ISPs. As Peter Rysavy has explained at length, these elements are inherently intertwined with, and fundamentally integrated into, mobile providers' broadband Internet access services.[97] Functionalities that are inherently intertwined with broadband Internet access and that do more than merely facilitate transmission include, for example, user-directed content filtering provided by ISPs, mobile broadband video optimization, ISP malware detection (including detection in accordance with the Commission's own CSRIC

[95] *See, e.g.*, Comments of CenturyLink, WC Docket No. 17-108, at 24-26 (filed July 17, 2017); Comcast at 12-20; Comments of Ericsson, WC Docket No. 17-108, at 12-13 (filed July 17, 2017) ("Ericsson"); Free State Foundation at 14-16; *cf. Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38; *Wireline Broadband Order*, 20 FCC Rcd at 14860-61 ¶ 9; *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13286-87 ¶ 9 (2006); *Wireless Broadband Order*, 22 FCC Rcd at 5909-11 ¶¶ 18-26.

[96] *See Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38 ("cable modem service … is an information service … regardless of whether subscribers use all the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service") (citation omitted); *Wireline Broadband Order*, 20 FCC Rcd at 14863 ¶ 15 ("The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.") (citation omitted).

[97] Rysavy Decl. ¶¶ 24-28.

III, Working Group 7 recommendations), and ISP email services (including spam filter functionality that retrieves, stores, processes, and transforms content marked as spam).[98] Speculation regarding whether or not customers value features other than the speed and reliability of the transmission offered by an ISP[99] is legally irrelevant: ISPs make these functionalities available as an inherently integrated aspect of their service offerings.

On this score, the "Internet Engineers" commenters similarly appear to misunderstand the relevant legal questions. They argue that third-party entities are providing DNS,[100] that caching by CDNs has in part supplanted ISP caching,[101] and that encryption has made ISP caching more difficult.[102] Their view seems to be that an offering cannot be integral to broadband Internet access unless it is "the [p]rovince [s]olely of ISPs."[103] This is, of course, wrong. Under their view, no offering could *ever* be a component of an information service if it were also offered by third parties. Congress said no such thing. Broadband providers continue to offer and employ DNS and caching (along with other core information-service capabilities), and those elements continue to be integral to their service bundles. Broadband providers continue to offer these capabilities, and *that* is the relevant legal question.

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[98] *Id.*

[99] *See, e.g.*, Joint Comments of Internet Engineers et al., WC Docket No. 17-108, at 18 (filed July 17, 2017) ("Internet Engineers").

[100] *Id.* at 15-17.

[101] *Id.* at 13-15.

[102] *Id.* at 14-15.

[103] *Id.* at 15; *see also id.* at 13 (contending that "[w]hile it is certainly true that ISP investment in increasing bandwidth (and innovations in how to provide that bandwidth) has enabled many of the services people think of as part and parcel of their Internet experience today (e.g. video streaming)," this is irrelevant to classification because "the overwhelmingly vast majority of those services were not actually created by ISPs and are not offered by ISPs.").

C. Caching, DNS, and Other Functions Do Not Constitute Mere Network Management.

The *Title II Order*'s defenders cannot dispute that DNS, caching, and other services provide the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," and so they try to argue that these offerings fall into the telecommunications network management exemption to the information service definition.[104] These claims are incorrect.

For example, for the reasons discussed above, the Center for Democracy and Technology ("CDT") is incorrect in claiming that caching and DNS "merely facilitate the functioning" of broadband access.[105] As technical materials in the record show, caching in fact affords customers additional capabilities by directing end-users' requests for specific content to different cache servers, depending upon the proximity of the end user and/or congestion at a given cache – thereby allowing content which would normally be delivered from a distant server to traverse the ISP-to-user connection, eliminating bottlenecks and adding value to users' broadband Internet access service.[106] Far from facilitating basic transmission, caching only occurs once the transmission has already taken place (i.e., when the data reaches the location at which it will be stored), or, alternatively, before it takes place (i.e., when the data is being stored at the location from which the user will download it). In fact, caching often obviates the need for substantial transmission altogether, by situating content closer to the end user such that it need not be transmitted from its original source each time it is requested by an end user. Cached data is stored until the subscriber seeks to retrieve it. ISP-supplied caching is built into, and inseparable

[104] *See, e.g.*, CDT at 5, 8-10 (caching and DNS); *id.* at 11-13 (firewalls, content filtering); OTI at 33-34; Public Knowledge/Common Cause at 42-53.

[105] CDT at 7-8.

[106] Rysavy Decl. ¶¶ 15-18; Bronsdon Decl. at 20 ¶ 8(g).

from, the broadband Internet access service offering, but is distinct from the offering's transmission element. These facts eliminate any doubt as to broadband's status as an information service. Moreover, there is no justification for the *Title II Order*'s conclusion that third-party caching services provided by content delivery networks are information services, but when the same caching functions are offered by the broadband provider, they are telecommunications management functions.[107] Caching is caching, and it is an information service regardless of who performs the functions. Even under the Commission's own definition – "the storing of copies of content at locations in a network closer to subscribers than the original source of the content"[108] – whether or not an activity comprises "caching" does not turn on who is performing the storage.

Likewise, OTI is wrong to contend that caching and DNS benefit the network provider, rather than the consumer, and therefore would have been deemed "adjunct to basic" in the pre-1996 framework.[109] As experts in the docket once again explain, and as described *supra*, DNS involves multiple actions outlined by Congress as components of an information service – servers *process* information when a DNS query is received, information is *generated* when a server delivers a response, servers *store* domain name information in their caches, information is *transformed* when a server transfers requests upstream, information is *retrieved* when domain names are obtained from the Internet, and information is *utilized* when stored in a cache.[110]

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[107] *See, e.g., Title II Order*, 30 FCC Rcd at 5771 ¶ 372 ("[T]his caching function provided by broadband providers as part of a broadband Internet service[] is distinct from third party caching services provided by parties other than the provider of Internet access service (including content delivery networks, such as Akamai), which are separate information services.") (citation omitted).

[108] *See Title II Order*, 30 FCC Rcd at 5758 n.973.

[109] OTI at 33-34.

[110] Rysavy Decl. ¶¶ 19-20; *see also* Bronsdon Decl. at 6-8 ¶ 8(b).

Thus, as the record clearly demonstrates, these capabilities provide tangible and significant benefits to consumers that go well beyond the provision of basic transmission.[111] Any claim these capabilities merely facilitate communications tantamount to legacy telephone calls is simply wrong.[112]

Likewise, Public Knowledge is mistaken in suggesting that an ISP-operated cache does not provide consumers with the capability for storing or retrieving data.[113] A cache is, quite literally, information stored for a consumer within an ISPs' network for retrieval – the *Title II Order* itself acknowledged that caching "enables more rapid retrieval of information from websites that subscribers wish to see more often."[114] As one technical expert explains, "network providers have DNS servers that cache IP addresses and other data to reduce the load on the DNS hierarchy and to reduce latency by responding directly to redundant DNS queries for the same hostnames or references in the hierarchy."[115] The "Internet Engineers," for their part, confirm that DNS provides significant value to the customer, above and beyond merely allowing the transmission of basic telecommunications:

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[111] Rysavy Decl. ¶ 24; *see also* Bronsdon Decl. at 7-8 ¶ 8(a) ("DNS also includes a variety of underlying network functionality information associated with names such as with name service (NS), mail exchange (MX) and service (SRV) records. It provides mechanisms, such as canonical name (CNAME), delegation name (DNAME), and pointer (PTR) records for selecting alternative routes to information as well as facilitating information distribution or content delivery systems. DNS also stores various types of security information, including sender policy framework (SPF) records to verify email sources and DNS Security (DNSSEC) credentials and signatures to authenticate domain names and services on the Internet. Domain names are regularly analyzed and categorized to facilitate web filters on firewalls and for parental controls. When a name is not found, the DNS can be used to redirect browsers to a web service that can correct typos or provide search assistance. The ways in which DNS is used to store, distribute, and process information is continually evolving in the IETF RFC technical documents.").

[112] Rysavy Decl. ¶¶ 30-38.

[113] Public Knowledge/Common Cause at 48-49.

[114] *See Title II Order*, 30 FCC Rcd at 5758 ¶ 356 n.973.

[115] Bronsdon Decl. at 19 ¶ 8(f) ("Content such as documents, web pages, images, gaming technology, IP addresses, live and on-demand videos, rich media content (including audio) and software updates may be cached or stored to reduce bandwidth usage, remove potential peering constraints, reduce server load, reduce latency and to provide a better overall experience for the online user.").

> By using DNS, the user does not need to know the IP address. More significantly, the IP address can change over time, including if the site moves behind a Content Delivery Network (CDN) to deliver the content more efficiently and ensure it remains available in case of a denial of service attack. *The benefit to the user is that they request the particular resource they want, using an addressing system that is human-memorable.*[116]

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Thus, the record assembled in this proceeding clearly demonstrates that broadband Internet access both was and is an integrated information service, and that the Commission would best effectuate its authorizing statute by reversing the *Title II Order* reclassification.

V. THE COMMENTS CONFIRM THAT MOBILE BROADBAND INTERNET ACCESS IS PROPERLY CLASSIFIED AS A PRIVATE MOBILE RADIO SERVICE.

As CTIA and others explained in the opening comments, the Commission may not impose common-carriage regulation on mobile broadband providers under the Act unless it finds that mobile broadband Internet access service is *both* a telecommunications service *and* a commercial mobile service.[117] As detailed above, broadband Internet service is not a telecommunications service, and, as explained here, mobile broadband is not a commercial mobile service.

A. Mobile Broadband Is a Private Mobile Service.

The record confirms that mobile broadband service is not CMRS under Section 332. Congress intended only mobile offerings that mimic traditional telephone service to be subject to common carrier treatment. All other mobile offerings, including mobile broadband, are

[116] Internet Engineers at 10 (emphasis added).

[117] *See, e.g.*, CTIA at 45 (stating that the "statutory barrier to common carrier regulation of mobile broadband extends beyond the restrictions that other provisions of the Act establish for broadband offerings generally"); Verizon at 50-51.

"private" offerings, for which Section 332 expressly prohibits common carrier treatment. Specifically, Section 332(d)(1) defines CMRS as any mobile service that is provided for profit and "makes interconnected service available" to the public.[118] For these purposes, Section 332(d) provides that "interconnected service" means a "service that is interconnected with *the* public switched network."[119] As CTIA and others explained, Congress's use of that phrasing makes clear that "the public switched network" necessarily refers to a *single* network, not an offering that interconnects with either of two networks.[120] Moreover, the Internet is a fundamentally different system that does not directly interconnect with the public switched telephone network.[121] It defies logic to call these two distinct systems a "single network" when billions of end points on the networks cannot communicate with each other. Congress understands this distinction. Indeed, as recently as 2012, Congress explicitly distinguished "the public switched network" from the "public Internet."[122]

As CTIA also explained, while Section 332 directs the Commission to define "public switched network" by regulation, the agency's definition must be consistent with the statutory text and congressional intent. In this regard, the relevant legislative history confirms that Congress would not take the view that the Internet is included in *the* "public switched network." The 1993 Conference Report accompanying OBRA-1993 confirms that, though Congress used the term "public switched network," it viewed that term as synonymous with "the Public switched *telephone* network."[123]

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[118] 47 U.S.C. § 332(d)(1).

[119] *Id.* § 332(d)(2) (emphasis added).

[120] *See* CTIA at 49-50; AT&T at 93; T-Mobile at 16; Verizon at 45.

[121] *See, e.g.*, CTIA at 49-50; AT&T at 93-94; Verizon at 46-47.

[122] 47 U.S.C. § 1422(b)(1)(B)(ii).

[123] H.R. Rep. No. 103-213, at 495 (Conf. Rep.) (emphasis added) ("OBRA-93 Conference Report").

OTI and others labor mightily to defend the *Title II Order's* radical and unlawful departure from the statute, the Commission's rules, and its precedents, but their arguments all fail. Lacking any textual basis for their claims, OTI makes unavailing claims that the legislative history supports the Commission's 2015 reading. First, it misreads the 1993 Conference Committee's Report. OTI contends that the House version of the bill used the term "public switched telephone network," and that the Conference Committee chose the Senate version, which dropped the word "telephone."[124] This is not so. The House and Senate versions of the bill (attached as Exhibit 1) *both* used the term "public switched network."[125] Therefore, the claim that Congress chose statutory text that used the term "public switched network" over text that used "public switched telephone network" is factually wrong. To the contrary, the Conference Report language to which OTI refers (attached as Exhibit 2) does not *quote* the House bill, but rather *describes* it – and characterizes it as requiring interconnection "with the Public switched telephone network,"[126] even though the legislation itself used the term "public switched network." This of course, *confirms* (rather than refutes) the conclusion that Congress meant the term "public switched network" to mean "public switched telephone network," and that the Commission should reinstate a consistent definition in section 20.3 of its rules.

Nor are OTI's statements from individual members of Congress enlightening in this regard.[127] Relying on statements from then-Representative Markey and Senator Inouye, OTI

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[124] *See* OTI at 81.

[125] *Compare* 139 Cong. Rec. H11577, H11733 (May 27, 1993) (reproducing the House's version of the bill, which (in section 5205(d)(1)(B)) required that a service be "interconnected … with the public switched network" in order to qualify as CMRS), *with* 139 Cong. Rec. S7913, S7999 (June 24, 1993) (reproducing the Senate's version of the bill, which (in Section 4009(a)(8)(B) also required that a service be "interconnected … with the public switched network" in order to qualify as CMRS).

[126] OBRA-93 Conference Report at 495.

[127] *See* OTI at 75-76.

asserts that "Congress in 1993 was keenly aware of the need to extend the utility of the 'public switched network' beyond telephony to high-speed Internet access."[128] For example, OTI points to Rep. Markey's expression of "concern[]" that the legislation would place too many services within the private mobile service ("PMRS") category, depriving the Commission of authority to impose common carrier regulation.[129] But there is no indication in the statute's text or history that Congress modified the legislation to narrow the PMRS category. To the contrary, the bill that passed was the same bill that Rep. Markey saw as defining that category broadly. Congress certainly took no steps to mandate common carrier treatment for mobile broadband, which did not at the time even exist. Thus, OTI simply assumes what it purports to prove – that Congress would have wanted the Commission to subject mobile broadband to common carrier requirements, even though (as OTI admits) "mobile broadband Internet access was unknown at the time."[130] In 2007, the Commission recognized this very point, explaining that "section 332 … did not contemplate wireless broadband Internet access service as provided today."[131]

Moreover, Congress's view of the public switched telephone network and the Internet as fundamentally distinct is bolstered, not undercut, by the fact that Congress was generally aware of the emerging Internet in 1993. If Congress had intended to encompass Internet access services that are distinct from the public switched telephone network within the definition of CMRS, it could – and *would* – have done so. Instead, it chose to draw a sharp distinction between traditional common-carrier offerings and other offerings, and exempted the latter from classification as CMRS. Congress established CMRS and PMRS as distinct categories, limited

[128] *Id.* at 82.

[129] *Id.* at 75.

[130] *Id.* at 82.

[131] *Wireless Broadband Order*, 22 FCC Rcd at 5918 ¶ 45 n.119.

CMRS to those offerings that are interconnected to the public switched *telephone* network, specifically deemed all other offerings to be PMRS, and explicitly exempted PMRS from common carrier treatment. These actions show that Congress intended to exempt services like mobile Internet offerings from common carrier regulation.

OTI further asserts that mobile broadband service must be classified as CMRS because "there is no networked service more open, interconnected and universally offered" today.[132] Again, the Commission should return to first principles and consider the language of the statute. Congress did not tether the CMRS designation to the "universality" of the network a service uses, but instead limited the term to services that interconnect with the public switched network.[133]

OTI's attempt to piggyback on the flawed logic of the *USTelecom* decision (which relied on an argument that the Commission had abandoned on appeal) and conflate VoIP applications with mobile broadband for classification purposes is similarly misguided.[134] As AT&T correctly observes, Section 332 "asks whether the mobile service *itself* is interconnected with the telephone network."[135] Although VoIP applications provided by Google, Vonage, and other third parties that ride on mobile broadband networks allow users to communicate with all telephone numbers, it is not true that the underlying mobile broadband service gives subscribers the "capability" to communicate to users via telephone numbers.[136] Put differently, the

[132] OTI at 77; *see also* NASUCA at 18; AARP at 31.

[133] In any event, there is more than a little irony in this argument, given that mobile broadband Internet came to be "universally offered" *without* being classified as CMRS or subject to common-carrier duties.

[134] *See* OTI at 83-88.

[135] AT&T at 95 (*citing Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45).

[136] *See* OTI at 89.

USTelecom panel's conclusion that a VoIP offering's "capability to communicate" with the public switched telephone network somehow justifies a finding that mobile broadband is "interconnected"[137] is wrong. That argument conflates the broadband offering with the application that rides over it. As the Commission made clear in 2007, classification must instead be based on the traits of the service itself, not those that rely on it.[138] For the same reason, it is irrelevant whether VoIP applications come "bundled with" a device's "operating system."[139] Rather, VoIP applications and mobile broadband are distinct, and a determination of whether a service is interconnected with the public switched telephone network must be based on its *own* features.

Notably, broadband service is often sold on devices with apps allowing access to video, but this does not render the service a broadcast television or cable service. Similarly, these devices might be loaded with the Facebook app, but this does not render mobile broadband a social network. Broadband is not a newspaper or a financial service, even though devices are often sold with applications allowing users to read headlines or purchase stocks online. So too, broadband is not VoIP, and cannot be said to offer interconnection with the public switched network simply because it may be accessed on devices whose operating systems can access other services that do.

Similarly, Voice over LTE ("VoLTE") and Wi-Fi calling are distinct offerings and cannot render the broadband offering CMRS.[140] Unlike VoIP services offered by third-party

[137] *See USTelecom*, 825 F.3d at 721.

[138] *See Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶¶ 45-46.

[139] OTI at 92.

[140] *See id.* at 92-93.

providers, VoLTE calls are "non-BIAS data services." They are not – and do not even *use* – the mobile broadband Internet access service.[141] And Wi-Fi calls generally traverse third-party Wi-Fi networks, and do not travel over providers' mobile broadband service network at all. In sum, OTI is again conflating mobile broadband Internet access with other, separate offerings.

B. Mobile Broadband Is Not the Functional Equivalent of CMRS.

Perhaps recognizing the infirmities of directly classifying mobile broadband Internet access as CMRS, OTI argues that the service is nevertheless the "functional equivalent" of CMRS.[142] As AT&T correctly notes, however, mobile broadband "cannot be the 'functional equivalent' of a service that *is* 'interconnected with the public switched network' because no one would view the two as remotely interchangeable."[143]

OTI ignores this altogether and asserts that mobile broadband Internet access service is functionally equivalent to "commercial mobile service" because it is "*not* remotely comparable to a private mobile radio service."[144] Contrary to this narrow portrayal of private mobile service, under which only services that resemble the offerings of 1993 can be deemed PMRS, Congress defined that residual category broadly: "*any* mobile service … that is not a commercial mobile service or [its] functional equivalent" is a "private mobile service," no matter how widely

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[141] *See* Bill Gaskill, *What is the Difference between VoIP and VoLTE?*, VoIP Report (Feb. 8, 2016), http://thevoipreport.com/article/what-is-the-difference-between-voip-and-volte/ ("The basic difference of VoLTE compared to VoIP is that VoLTE requires a [Quality of Service] component. Voice packets for VoIP get sent along Internet nodes and are treated no differently than any other data. VoLTE uses [IP Media Subsystem] and a separate radio frequency to help maintain the quality of the VoLTE transmission."); *Title II Order*, 30 FCC Rcd at 5697 ¶ 208 n.537 (citing VoLTE, facilities-based VoIP, and IP video as examples of "specialized services" under the *2010 Open Internet Order*); *Id*. at 5697 ¶ 209 (explaining that non-BIAS data services: (1) are not used to reach large parts of the Internet; (2) are a specific "application-level" service; and (3) use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services).

[142] *See* OTI at 94-99.

[143] AT&T at 91.

[144] OTI at 95; *see also* AARP at 31 (asserting that private mobile services, such as private taxi dispatch services, have no relation to mobile broadband services).

available.[145] Congress adopted this structure because the purpose of Sections 332(c) and (d) was to regulate mobile voice services that were essentially indistinguishable from cellular phone service, while leaving all other mobile services free to flourish without the burden of common-carrier regulation.

Indeed, OTI's repeated references to third-party VoIP applications highlight the fact that mobile broadband is *not* the functional equivalent of CMRS. Rather, the mobile *broadband* service that carries VoIP traffic is distinct from the voice service offered by either CMRS or VoIP, and mobile broadband is not "closely substitutable" for mobile voice.[146]

Finally, the fact that mobile broadband Internet access service may be bundled with voice and messaging services does not demonstrate that it is the "functional equivalent" of CMRS.[147] As an initial matter, well-established precedent dictates that identical regulation does not apply to several services simply because they are sold together (and even used through the same device).[148] Furthermore, consumers readily understand the differences between the data, voice, and messaging services on their mobile devices.[149]

Section 332's protections against common-carrier regulation are especially important in light of fierce competition in the mobile broadband marketplace. Common-carrier regulation was designed in the 19th century for railroads and then extended to copper-wire telephone

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[145] 47 U.S.C. § 332(d)(3) (emphasis added).

[146] *See* CTIA at 52-53.

[147] *See* OTI at 97-99.

[148] *See Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) ("Even though wireless carriers ordinarily provide their customers with voice and data services under a single contract, they must comply with Title II's common carrier requirements only in furnishing voice service.").

[149] Notably, OTI asserts that messaging is a "classic" example of CMRS. *See* OTI at 97. This is not so. Text messages are not interconnected with the public switched telephone network. Specifically, the vast majority of wireline customers can neither send nor receive messages via their wireline phones. In any event, the issue of text messaging classification is pending before the Commission. *See* Petition of Public Knowledge et al. for Declaratory Ruling, WT Docket No. 08-7 (filed Dec. 11, 2007).

monopolies. It has no place in the mobile broadband market, where change is the only constant. Congress thought so, too, which is why the Act exempts a significant swath of mobile service offerings from these mandates.

VI. GIVEN THE PROBLEMS ASSOCIATED WITH THE *TITLE II ORDER*, THE FCC SHOULD UNDO THE RULES AND CONGRESS SHOULD STEP IN AND ADOPT A NEW INTERNET FREEDOM REGULATORY PARADIGM.

As CTIA detailed in its opening comments, the *Title II Order* adopted the wrong approach to Internet openness. By replacing a model favoring product differentiation and experimentation with one that drives towards uniformity and commoditization of service,[150] the Title II framework forces mobile broadband providers to labor under a regime that casts a deeply skeptical eye on innovation. This is wholly inappropriate for the dynamic and competitive mobile broadband industry. As FTC Acting Chairman Maureen Ohlhausen observed, the Title II paradigm of prescriptive regulation is especially problematic because it "risks cementing in place practices that may need to evolve as consumer preferences change."[151] To rectify this situation, the Commission and Congress should adopt a new paradigm for the open Internet.

A. The Comments Demonstrate that the General Conduct Standard Thwarts Consumer-Driven Innovation in the Mobile Marketplace.

The record explains in great depth how the incurably vague general conduct standard injects uncertainty into the market, impeding innovation and investment alike. As CTIA and others explained in their opening comments, the previous Commission refused to articulate a coherent "case-by-case" mechanism for applying the general conduct standard.[152] In turn, the

[150] *See* Comments of Professor Daniel Lyons, WC Docket No. 17-108, at 4 (filed July 18, 2017) (explaining why "a one-size-fits-all broadband model is ill-fitted to today's diverse user population").

[151] Federal Trade Commission Acting Chairman Maureen K. Ohlhausen, WC Docket No. 17-108, at 10 (filed July 17, 2017).

[152] *See*, *e.g.*, AT&T at 50-51 ("All of the operative terms in the regulation – unreasonably, interfere, and disadvantage – are 'classic terms of degree' that give regulated parties 'no principle for determining' when they pass

general conduct standard forces mobile broadband providers to consider the risk that their every decision – from developing new pricing plans, network configurations, and business relationships to responding to specific threats to the network in real time – "will run afoul of regulators based on the whims of the current Chairman."[153] Even proponents of strict Title II mandates acknowledge that the general conduct standard "is overly complex, and its application to BIAS provider practices is unpredictable, which may chill speech and innovation."[154] Furthermore, the standard (along with the advisory opinion process set forth in the *Title II Order*) is completely divorced from the rapid pace of innovation in the mobile marketplace. As ADTRAN aptly observes, "[w]hile it may have been tolerable to conduct years-long investigations of monopoly-era tariffs under the similarly vague 'just and reasonable' standard, ISPs cannot engage in the competitive, fast-paced Internet marketplace under such conditions."[155]

Still worse, the uncertainty resulting from the general conduct standard has undermined the very consumer experience the Commission should be trying to protect – just as providers predicted it would. Indeed, as CTIA and others detailed in their opening comments, the long-running debate over popular free data programs demonstrates the very real harms that the vague

'from the safe harbor' of the permitted 'to the forbidden sea' of the prohibited); Cox at 16 (stating that Cox "has been forced to devote additional resources to assessing compliance risks under the vague and boundless General Conduct Standard, thus increasing the costs and complexity of providing broadband services."); Technology Policy Institute at 10 (The existence of this provision is likely to "lead to a steady stream of complaints from interested parties" and "continual second-guessing of providers' business practices and pricing decisions on the part of the [FCC].").

[153] Declaration of Robert Hahn, WC Docket No. 17-108, at ¶ 48 (July 17, 2017) (attached to CTIA comments as Exhibit B).

[154] EFF at 2.

[155] Comments of ADTRAN, Inc., WC Docket No. 17-108, at 23 (filed July 17, 2017) ("ADTRAN").

general conduct standard has visited on innovation and consumers.[156] Mobile broadband providers' experience with the FCC's investigative foray into free data offers a stiff rebuke to those commenters, such as the Internet Association, who claim that the Title II framework provides "legal certainty for ISPs."[157]

Despite all of this, advocates of heavy-handed regulation continue to cling to the idea that a "robust" general conduct standard must be maintained to preserve an open Internet. Pointing to the Commission's investigation into free data offerings, for example, OTI claims that the elimination of the general conduct standard will "incentivize ISPs to invest in new ways to monetize the scarcity of their existing network rather than deploy new infrastructure."[158] This assertion is meritless. As AT&T observes, free data "did not give mobile providers incentives to create artificial scarcity by limiting their data buckets so that they could convert 'the Internet [into] cable TV.' Instead, competition drove all major mobile providers to *increase*, rather than decrease, their subscribers' data buckets."[159]

AT&T is not alone in espousing the benefits of such plans. An analysis by former FCC Chief Economist William Rogerson demonstrates that free data services and data allowances promote greater choice, more data use, and more innovation for consumers by offering consumers a range of mobile plans at different prices.[160] This is consistent with a study on free data services in the European Union, which concludes that such plans are "beneficial to both

[156] *See* CTIA at 9-12; AT&T at 55-59; T-Mobile at 9-11.

[157] Comments of Internet Association, WC Docket No. 17-108, at i (filed July 17, 2017).

[158] OTI at 62.

[159] AT&T at 18.

[160] *See* William P. Rogerson, *The Economics of Data Caps and Free Data Services in Mobile Broadband* (Aug. 17, 2016) (attached to letter from Scott K. Bergmann, Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Docket No 14-28).

consumers and competition."[161] Free data services also benefit consumers by expanding access to broadband. As MMTC found in a report issued last year, the proposition that free data services harm consumers "ultimately overlook[s] and dismiss[es] the benefits of free data, many of which accrue most immediately to people of color and low-income households – communities that are benefitting from mobile broadband access in much more profound ways than other user groups because it is more likely that they cannot afford other means of home broadband access."[162] For all of these reasons, CTIA concurs with NCTA that if "such consumer-friendly practices may be condemned (or at least credibly threatened) under the General Conduct Standard, it is hard to imagine what cannot."[163]

B. The Record Confirms that the *Title II Order's* Categorical Restrictions are Counterproductive.

A review of the record shows that the categorical restrictions adopted in the *Title II Order* unnecessarily restrain the ability of mobile broadband providers to support consumer-friendly applications or manage their networks. These overly prescriptive mandates have derailed the flexible environment of permissionless innovation that allowed mobile providers to find new ways to handle the ever-growing demand for broadband, while ensuring that consumers gain access to the content, services, and applications they want to use.

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[161] Letter from Roslyn Layton, PhD Fellow, Center for Communications, Media, and Information Technologies, Aalborg University, to Frode Sørensen & Ben Wallis, Co-Chairs, Net Neutrality Expert Working Group, Body of European Regulators for Electronic Communications, EU 2011-2016 (Jul. 26, 2016), http://roslynlayton.com/wp-content/uploads/2016/07/Academic-evidence-for-outcomes-on-zero-rating-and-net-neutrality-policy-for-EU-2011-2016.-Special-letter-for-BEREC.pdf; *see also* European Comm'n, Zero-Rating Practices in Broadband Markets, at vii-viii (Feb. 2017), http://ec.europa.eu/competition/publications/reports/kd0217687enn.pdf ("there appears to be little reason to believe that zero-rating gives rise to competition concerns").

[162] Multicultural Media, Telecom and Internet Council ("MMTC"), *Understanding and Appreciating Zero-Rating: The Use and Impact of Free Data in the Mobile Broadband Sector*, at 2 (May 9, 2016), http://mmtconline.org/WhitePapers/MMTC_Zero_Rating_Impact_on_-Consumers_May2016.pdf.

[163] NCTA at 44.

For example, many commenters observe that the unqualified paid prioritization ban adopted in the *Title II Order* may undermine future broadband offerings that enhance consumer welfare.[164] Specifically, AT&T identifies numerous examples of latency-sensitive traffic – including high-definition videoconferencing and multi-player online gaming – for which prioritization "could substantially enhance consumer welfare" if such treatment were not "currently prohibited by the Commission's flat ban."[165] Policymakers should ensure that any rules applied to the dynamic broadband sector do not prohibit or deter such welfare-enhancing arrangements.

Moreover, the record confirms that the narrow flexibility that the *Title II Order* provides for reasonable network management must be revisited. The *Title II Order* requires that a network management practice must be "primarily motivated by a technical network management justification."[166] As Sprint observes, however, "changing trends in application consumption" will require mobile network operators to "balance technical and business considerations in managing tonnage and allocating network resources, find ways to deliver quality, high-bandwidth application experiences to consumers without negatively impacting consumers of other applications, and deliver compelling service offerings to consumers with ever changing patterns of consumption."[167] T-Mobile adds that "the limitations on systemic efforts to mitigate congestion and on any mechanisms that could potentially be challenged as being premised on 'business justifications' undermine providers' ability to promote rational, user-friendly allocation

[164] *See, e.g.*, ADTRAN at 24-25; AT&T at 38-41; Comments of Cisco Systems, Inc., WC Docket No. 17-108, at 9-10 (July 17, 2017); Comcast at 62-63; Cox at 27-28; Comments of Nokia, WC Docket No. 17-108, at 4-5 (filed July 17, 2017).

[165] AT&T at 40.

[166] *Title II Order*, 30 FCC Rcd at 5700 ¶ 216.

[167] Comments of Sprint Corporation, WC Docket No. 17-108, at 9 (filed July 17, 2017) ("Sprint").

of limited network resources."[168] This regulatory overhang causes network operators to second-guess all of their decisions, which jeopardizes network management in the near term and consumer value and innovation in the long term.

C. There Is No Need for Enhanced Transparency Requirements.

The Commission should eliminate the 2015 "enhancements" to the transparency rule. As CTIA noted in its opening comments, even the Obama-era Office of Management and Budget questioned whether the enhanced transparency rule makes sense as applied to mobile broadband providers.[169] In contrast, the 2010 rule, which requires mobile providers to disclose information on prices, speeds, and network management practices, promotes openness and consumer choice in the mobile environment. Further, the more granular disclosures mandated by the enhanced transparency rule and staff's *2016 Guidance Public Notice* impose tremendous burdens on providers, notwithstanding the absence of any commensurate benefit to consumers.[170]

The record supports the elimination of overly prescriptive transparency requirements for mobile providers. In addition to generalized assertions from some commenters about the need for the enhanced transparency rule,[171] the record is devoid of any evidence that these "enhancements" provide additional benefits in the mobile marketplace. Furthermore, AARP's claim that the 2015 enhancements are essential because "there is no evidence to support the proposition that broadband markets are competitive for either end users or edge providers" lacks merit.[172] As discussed above, the facts demonstrate that the opposite is true in the mobile

[168] T-Mobile at 22.

[169] *See* CTIA at 18.

[170] *See id.* at 18-20; Sprint at 15-16; T-Mobile at 18-21.

[171] *See, e.g.*, Attorneys General at 20-22.

[172] AARP at 28.

marketplace. In the intensely competitive mobile ecosystem, service providers can be expected to make meaningful information available to consumers and edge providers for the same reasons that companies in hundreds of other ultra-competitive markets do: because their customers will go elsewhere if they do not.[173] In any event, as a backstop to the protections afforded to wireless customers through CTIA's *Consumer Code for Wireless Service*, the concerns of advocates of enhanced transparency can readily be resolved through enforcement of the original requirements.

D. Congress Should Chart a New Course for Open Internet Policy.

Ultimately, then, the top-down framework adopted in the *Title II Order* reflects the wrong approach to Internet openness. Fortunately, there are other – and better – means of securing an open Internet. Beyond Commission action to undo the Title II framework in this proceeding, numerous commenters agreed with CTIA that Congressional action is needed to establish a durable legal foundation and light-touch rules that will generate lasting benefits for consumers.[174] Although the Act correctly charted a course that favors competition and demands market-driven outcomes, it is clear that additional legislative action is warranted to foreclose the possibility of ill-conceived and unnecessary impediments to innovation and investment in broadband networks.

VII. CONCLUSION

The Commission should firmly reestablish broadband Internet access's classification as an interstate information service, and should revoke the open-ended general conduct standard. The Commission also should eliminate the *Title II Order*'s categorical restrictions and the so-

[173] *See supra* Section II (citing economic evidence explaining that competition motivates providers to deliver consumer benefits and avoid harms, or risk losing customers to rivals).

[174] *See, e.g.*, ACT | The App Association, WC Docket No. 17-108, at 12, 17 (filed July 17, 2017); AT&T at 7; Comcast at 9-10; Cox at 3; Ericsson at 2, 14; Nokia at 14; T-Mobile at 27-29; Verizon at 13.

called “enhancements” to the 2010 transparency rule, both of which harm consumers. Likewise, the Commission should reaffirm that broadband Internet access is an inherently interstate service *and* that states and their political sub-divisions have no jurisdiction to apply their own regulatory mandates. Finally, CTIA supports Congressional action to adopt specific, common-sense net neutrality rules. Taken together, these actions will bring more than a decade of uncertainty to a close and ensure that consumers continue to enjoy the benefits of broadband services – and particularly mobile broadband services – going forward.

Respectfully submitted,

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